BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2006-107-WS – ORDER NO. 2008-129

FEBRUARY 20, 2008

IN RE:	Application of United Utility Companies, Inc. for Adjustment of Rates and Charges for the Provision of Water and Sewer Service.	)))	ORDER DENYING PETITIONS FOR RECONSIDERATION

INTRODUCTION

This matter comes before the Public Service Commission ("PSC" or "Commission") on the Petition for Rehearing or Reconsideration filed by United Utility Companies, Inc. ("United" or "Company") and on the Petition for Reconsideration or Rehearing filed by the South Carolina Office of Regulatory Staff ("ORS"), both of which seek relief from the Commission's ruling in Order No. 2006-593.[1] The Commission's order rejected a proposed settlement, agreed to by United and ORS, under which United would have been permitted to implement rate increases affecting customers of the Company's water and/or sewer systems. Having carefully considered both petitions, the Commission hereby denies reconsideration and rehearing and reaffirms its ruling.

The central issue in this case is whether the General Assembly intended Act 175 of 2004 ("Act 175") to strip the PSC of the authority to independently determine whether

[1] The issues presented in this case are substantially similar, and in many respects identical, to those presented in In re Application of Carolina Water Service, Inc., Case No. 2006-92-WS. In Order No. 2006-543 (October 2, 2006), we denied Carolina Water Service's application for rate relief, and in Order No. 2007-140 (November 19, 2007), we denied the parties' petitions for reconsideration.

a proposed settlement of a rate case is just and reasonable. In Act 175, which restructured the state's system of utility regulation, the General Assembly constituted the ORS to be the investigator and advocate for the statutorily-defined "public interest"[2] in utilities matters. At the same time, the Act re-cast the Commission as a quasi-judicial decision maker and specified that the Commission would be governed by the Code of Judicial Conduct.[3]

United and ORS argue that Act 175 requires the PSC to summarily approve proposed settlements without any substantive review. The Commission rejects this view and holds that it retains a statutory duty to ensure that any settlement agreement is just and reasonable, and that when the parties refuse to present to the Commission sufficient information to make this determination, the Commission may reject the settlement. In this case, the parties either failed, or refused, to present sufficient evidence to afford the Commission the opportunity to carry out its duty of ensuring that the proposed settlement was just and reasonable. It is possible, and perhaps even likely, that if United and the ORS had presented the supporting evidence requested by the Commission, the proposed

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[2] Chapter 4 of Title 58, enacted pursuant to Act 175 of 2004, defines "public interest" as a balancing of the following:

> (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer;
> (2) economic development and job attraction and retention in South Carolina; and
> (3) preservation of the financial integrity of the state's public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.

S.C. Code Ann. §58-4-10(B).

[3] Under Act 175, S.C. Code Ann. § 58-3-30(B) subjects the Commission to Rule 501 of the South Carolina Appellate Court Rules and charges the State Ethics Commission with its enforcement.

settlement would have been approved. However, because the parties insisted that they had an absolute right to settle this case without independent review and refused to present sufficient evidence to support a finding that the proposed settlement was just and reasonable, the Commission rejected the proposed settlement.

Now, having fully reviewed all of the arguments presented by United and ORS in favor of reconsideration or rehearing and found them to be unsupported in the law and evidence, we reject them in their entirety.

RELEVANT PROCEDURAL HISTORY

United filed its Application for Adjustment of Rates and Charges on April 10, 2006. Thereafter, at the request of several of United's customers, the Commission scheduled public hearings in several locations around the state to allow members of the public to comment on the proposed rate increases. At the public hearings, customers voiced various concerns about the proposed rate increases, United's collection practices, and the quality of United's service.

On August 23, 2006, the parties filed a proposed settlement agreement and explanatory brief. The parties agreed to stipulate into the record the pre-filed testimony of the following individuals: company witnesses Lena Sunardio and Bruce Haas; retained expert witnesses Converse A. Chellis, III, C.P.A., and B.R. Skelton, Ph.D.; and ORS witnesses Christina A. Seale and Dawn M. Hipp. The parties only called Chellis and Skelton to the stand for live testimony at the settlement hearing.

The Commission reviewed the settlement agreement, explanatory brief, and testimony proposed to be stipulated by the parties, and thereafter issued a directive on September 6, 2006 in which it requested that the parties present testimony and introduce

evidence with regard to these topics: the frequency of sewer backups and measures taken to prevent sewer problems, the fairness and propriety of flat-rate sewerage billing, allegations of improper billing and collections practices, and compliance with DHEC and Commission regulations.

At the settlement hearing held on September 8, 2006, the parties failed to present any evidence responsive to the Commission's requests for information, calling two expert witnesses who only testified generally as to the desirability of the settlement. Both experts admitted they had no knowledge pertaining to the matters about which the Commission had requested additional information. Tr. 17-19, 28-29 (Settlement Hearing, September 8, 2006).

The Commission rejected the Settlement Agreement on September 8, 2006, finding that the parties had failed to present the Commission with sufficient evidence that the proposed rates and terms were just and reasonable. Commission Directive (September 8, 2006); Order No. 2006-593 (October 16, 2006). However, in its September 8, 2006, Directive, the Commission offered to hold a final hearing at which it would hear additional supporting evidence, and at which United could elect to seek either the rate relief proposed in its original application or the rate relief proposed in the terms of the settlement.

On September 20, 2006, counsel for the parties informed the Commission that they would present no evidence in addition to that already presented to the Commission, and that no further hearing would be necessary. Letters from John M.S. Hoefer and Nanette S. Edwards (September 20, 2006).

Ultimately, the Commission denied the rate increase request, citing a lack of information which would have allowed it to find the proposed rates just and reasonable. Order No. 2006-593 (October 16, 2006).

DISCUSSION OF SPECIFIC ISSUES

I. The parties erroneously assert that only parties of record may raise issues of fact before the Commission, and that the Commission's inquiries contained in its September 6, 2006 are proscribed by Act 175 of 2004, the Code of Judicial Conduct, the S.C. Constitution, and the South Carolina Rules of Evidence.

United argues that the enactment of Act 175 of 2004 ("Act 175") deprived the Commission of authority to request information when inquiring into the terms of a settlement. Specifically, it incorrectly characterizes the Commission's requests as an attempt to issue interrogatories to the parties, an action which would be inconsistent with the General Assembly's recent amendment of S.C. Code Ann. §58-3-190. United also argues that the ORS has the sole authority to inspect and audit utilities under recently enacted S.C. Code Ann. §58-3-60(D) and that the Commission's requests for information in the case contravened this statute.[4]

[4] S.C. Code Ann. §58-3-60(D) states:

> (D) The commission shall not inspect, audit, or examine public utilities. The inspection, auditing, and examination of public utilities is solely the responsibility of the Office of Regulatory Staff.

S.C. Code Ann. §58-3-60 (Supp. 2006).

Prior to Act 175 of 2004, S.C. Code Ann. §58-3-190 stated, in pertinent part:

> All persons or corporations that are included within the definition of a "public utility" ... shall promptly ... answer fully all questions and interrogatories which may be propounded by the Commission.

Similarly, the ORS cites §§58-4-50(A)(2), 58-4-55, and 58-3-200, which provide that while inspections, audits, and investigations may be initiated at the request of the Commission, they must be carried out by the ORS. The statutes referred to by the parties fail to support their argument that the Commission may not request that parties provide information to support a proposed settlement. The referenced code sections do assign the investigatory and advocacy duties previously carried out by the Commission's staff to the ORS, but they do not strip the PSC of the authority to request information from the parties sufficient to support a proposed settlement of a rate case. While Act 175 divested the Commission's staff of the duties of propounding data requests or other discovery and conducting audits, the Act did not deprive the Commission of the power to ask questions or request information while carrying out its quasi-judicial functions in a rate case. Nowhere in Act 175 did the General Assembly indicate that it intended to curtail the Commission's authority to require the applicant for a rate increase to prove that the requested increase is just and reasonable.

ORS also relies upon Section 233 of 2006 S.C. Acts 318, which repealed S.C. Code Ann. §58-5-280, to support its contention that the Commission exceeded its authority by requesting additional information in its September 6, 2006, directive. United Petition, at p. 3. This reliance is misplaced. Section 58-5-280 of the Code formerly

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S.C. Code Ann. §58-3-190 (1976) (amended 2005).

The amended statute authorizes the Commission to request that the ORS carry out inspections, audits, or investigations. S.C. Code Ann. §58-3-190 (Supp. 2006). These requests for field investigations are distinct from the questions posed by the Commission during the course of a case.

authorized the Commission to initiate inquiries into any subject matter within its jurisdiction "in like manner as though a petition or complaint had been filed with it." S.C. Code Ann. §58-5-280 (1976). The Section further provided that in initiating such an inquiry, "the Commission shall enter an order to show cause, directing the person or corporation whose affairs are the subject matter of the investigation to appear in person or by counsel and show cause." Id. Thus, the General Assembly, in enacting Section 58-5-280, contemplated that the Commission would be authorized to initiate its own dockets and investigations in matters where there were no other pending controversies, and that the Commission would be empowered to issue rules to show cause and compel the party being investigated to appear.

The ORS's argument that the repeal of Section 58-5-280 amounted to a prohibition of the Commission's request for more information in the present case is unwarranted. Section 58-5-280 in no way restricted the right of the Commission to request further information from the parties to an existing docket in the course of fulfilling the Commission's duty to evaluate a proposed rate increase for justness and reasonableness and adjudicate the issue of whether the increase should be approved. In the present case, the Commission did not attempt to initiate a docket and compel the appearance of a regulated entity to appear and show cause. Rather, the Commission informed the parties of certain areas of concern which it viewed as having been inadequately addressed by the parties in the existing record and asked the parties to provide further information which the Commission deemed necessary to evaluate and adjudicate the proposed settlement. The Commission's directive of September 6 did not

fall within the purview of Section 58-5-280, and the repeal of this Section of the Code therefore did not render the Commission's directive unlawful.

United claims the Commission violated Rule 614(b) SCRE,[5] which states "When required by the interests of justice only, the court may interrogate witnesses." The Company's allegation lacks any specificity as to how United believes the rule was violated. Regardless, the Commission properly exercised its authority under this rule. The Reporter's Notes discussing subsection (b) clarify that the rule requires a court interrogating a witness to "be careful not to intimate any opinion as to the force and effect of the testimony by its questions." This note is consistent with South Carolina case law on the subject of a trial court's right to interrogate witnesses. The appellate courts of South Carolina have long held that a trial judge is vested with discretion to question a witness or a party to elicit the truth. State v. Gaskins, 284 S.C. 105, 119, 326 S.E.2d 132, 140-41 (1985); Williams v. S.C. Farm Bureau Mut. Ins. Co., 251 S.C. 464, 472, 163 S.E.2d 212, 216 (1968) (explaining that a trial judge who exercises his discretion to question witnesses from the bench to elicit the truth should not indicate to the jury the judge's opinion as to the facts of the case or the weight or sufficiency of the evidence). This is particularly so in non-jury cases where there is no danger of the jury inferring the judge's opinion from the questions posed from the bench. S.C.D.S.S. v. Ledford, 357 S.C. 371, 378, 593 S.E.2d 175, 178 (Ct. App. 2004). Where the facts warrant, a trial judge may even call a witness on his own motion. Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384, 389 (1957).

[5] United Petition, at pp. 4-5.

As a quasi-judicial finder of fact in the instant rate case, the Commission likewise has the right to interrogate witnesses. As ORS observed in its own petition for reconsideration, "The Commission now has the responsibility of wearing the robe of an impartial judge and weighing the evidence admitted into the record to reach a decision." ORS Petition, at p. 8. It is entirely consistent with this statement that when the evidence in the record is insufficiently complete to warrant approval, the Commission may ask questions of the witnesses presented and request that the party or parties supplement the evidence in the record in an effort to facilitate approval of a settlement. ORS and United argue that the Commission violated Canon 3 of the Code of Judicial Conduct by "attempt[ing] to independently investigate facts in a case and solicit[] evidence to be presented." ORS Petition, at p. 5; see also, United Petition, at p. 4. The parties rely upon S.C. Code Ann. §58-3-30(B), which generally subjects the Commission and Commission Staff to the provisions of the Code of Judicial Conduct. United charges that by seeking information beyond that which the parties presented in support of the proposed settlement, the Commission conducted an "impermissible independent investigation," "independently investigat[ed] facts not introduced into evidence," and acted as both prosecutor and adjudicator in this case, thereby violating Canon 3 of the Code of Judicial Conduct, certain provisions of Act 175 and Article I, Section 22 of the South Carolina Constitution. United Petition, at p. 5.

The Commission's inquiries did not violate the Code of Judicial Conduct in any way. The parties apparently rely upon a single sentence from the Commentary to Canon 3B(7), which states, "A judge must not independently investigate facts in a case and must consider only the facts presented." However, read in context, this sentence clearly

prohibits *ex parte* communications, not the on-the-record public inquiries made of the Commission in this case. The parties' expansive reading of this sentence would lead to the absurd result of prohibiting the court from requesting from the parties, on the record, any information other than that volunteered by the parties themselves. In full context, the Commentary relied upon by the parties is reproduced here:

> The proscription against communications concerning a proceeding **includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding**, except to the limited extent permitted.
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> To the extent reasonably possible, **all parties or their lawyers shall be included in communications with a judge.**
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> Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.
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> An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.
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> Certain **ex parte communication** is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.
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> Examples when an **ex parte communication** may be expressly authorized by law include the issuance of a temporary restraining order under certain limited circumstances [Rule 65(b), SCRCP], the issuance of a writ of supersedeas under exigent circumstances [Rule 225(d)(6), SCACR], the determination of fees and expenses for indigent capital defendants [S.C. Code Ann. § 16-3-26

> (Supp. 1995)], the issuance of temporary orders related to child custody and support where conditions warrant [S.C. Code Ann. § 20-7-880 (1985)], and the issuance of a seizure order regarding delinquent insurers [S.C. Code Ann. §38-27-220 (Supp. 1995)].
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> **A judge must not independently investigate facts in a case and must consider only the evidence presented.**
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> A judge may request a party to submit proposed findings of fact and conclusions of law, **so long as the other parties are apprised of the request** and are given an opportunity to respond to the proposed findings and conclusions.
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> A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.
>
> If communication between the trial judge and the appellate court with respect to a proceeding is permitted, **a copy of any written communication or the substance of any oral communication should be provided to all parties.**

CJC, Rule 501, SCACR, Commentary to Canon 3(b)(7) (emphasis added).

Furthermore, the main case cited by the Company in support of its assertion that the Commission had violated Canon 3 actually turned upon the *ex parte* nature of the investigation. In State v. Dorsey, 701 N.W.2d 238 (Minn. 2005), the Supreme Court of Minnesota, in a 4-3 decision, overturned a criminal conviction because of a trial judge's independent *ex parte* investigation of the facts. The trial judge had directed her law clerk to check court records to independently verify the testimony of a key defense witness in a criminal bench trial. The law clerk's research was only disclosed to the parties after the fact, and therefore was held by the Minnesota Supreme Court to be an impermissible independent investigation. State v. Dorsey, 701 N.W.2d 238, 245 (Minn. 2005).

The cases cited by United in Footnote 3 on pages 5 and 6 of its Petition are similarly inapposite. The case of Horton v. Ferrell involved a special master appointed to make findings regarding dissolution of a partnership. The special master "submitted to each side a list of questions to be answered, and used ... unsworn answers in the preparation of his report." 335 Ark. 366, 368-69, 981 S.W.2d 88 (1988). The master also "consulted a number of third parties and other sources to obtain much of the information utilized in his findings." Id. The Supreme Court found "Here the master conducted an independent investigation, and obtained evidence in an *ex parte* communication manner clearly in violation of Canon 3(B)(7)." Horton v. Ferrell, 335 Ark. at 371, 981 S.W.2d at 90.

In the case of *In re* Richardson, cited by United as "holding that judges are not investigation instrumentalities of other agencies of the government," the Court of Appeal of New York held that a state law allowing the Governor to appoint a sitting judge to act as a special prosecutor in a public corruption case violated that state's constitutional prohibition against judges holding other public offices. *In re* Richardson, 247 N.Y. 401, 414, 160 N.E. 655, 659 (1955).

United further cites State v. Vanmanivong, 261 Wis.2d 202, 661 N.W.2d 76 (2003), as "holding it is error for a judge to independently gather evidence in a pending case." CWS Petition, p. 8, n. 6. The case involved a judge who failed to follow the required statutory procedures when he held an *in camera* hearing regarding a confidential informant. The judge committed error because he solicited, and relied on, unsigned *ex parte* statements from a detective in conducting his review. State v. Vanmanivong, 261 Wis.2d at 228-229, 661 N.W.2d at 89.

United also cites the unpublished opinion of the Tennessee Court of Criminal Appeals, Minor v. State, in which the petitioner alleged that the trial judge had violated the Code of Judicial Conduct in the course of handling a competency hearing and sought recusal. 2001 W.L. 1545498 (Tenn. Ct. Crim. App. Dec. 5, 2001). However, on appeal, the trial judge was found to have engaged in no such misconduct, and no ground for recusal was found. While acknowledging that "the court must generally restrain itself to consideration of those facts that are before it and may not conduct an independent investigation," the appellate court held that the judge was entitled to independently review and take judicial notice of the appellant's civil case files because he put the information on the record and gave the parties an opportunity to object. The court held, "Because the court properly exercised its powers of judicial notice, the references to the civil file did not constitute an improper, *ex parte* investigation, and provide no basis for recusal." Id. at *12 (Tenn. Crim. App. 2001). The Minor case therefore lends no support to United's argument.

Unlike the trial court in Dorsey, the Commission did not conduct any *ex parte* investigation in this case. It did not independently investigate facts on its own. The Commission made an on-the-record request for additional information. In making its request, the Commission gave the parties the opportunity to present evidence pertaining to issues which the Commission believed needed to be addressed more fully and afforded them the latitude to address the Commission's concerns the way they saw fit. The Commission's request in no way constituted an impermissible *ex parte* communication.

Nor did the Commission's request for more information violate the South Carolina Constitution. United argues that by requesting information of the Company, the

Commission acted as both a prosecutor and adjudicator in violation of Art I., Sec. 22 of the state constitution, and cites to Ross v. Medical Univ., 328 S.C. 51, 492 S.E.2d 62 (1997). The Ross case involved a university vice-president's participation in the termination proceedings of an adjunct professor. In that case, the vice-president independently investigated allegations of misconduct, testified as a witness before the university's grievance board, and thereafter reviewed and concurred in the grievance committee's findings as part of the university's disciplinary procedure. Ross, 328 S.C. at 70, 492 S.E.2d at 72. The Commission's on-the-record request for information from the parties is not remotely comparable to the dual roles played by the university official in Ross.

The ORS now argues for the first time on reconsideration, that it was "inappropriate for the Commission to actively solicit potential evidence, in the form of testimony or otherwise, from a witness." ORS Petition, at pp. 5-6. On the other hand, ORS asserted at each public hearing that the testimony of public witnesses was "admissible for purposes of this night hearing." See, e.g., Transcript, Spartanburg Public Hearing, at p. 8 (July 17, 2006). ORS failed to object at any time when Commissioners asked follow-up questions of the public witnesses, consistent with its apparent views at that time to the effect that the public witnesses' testimony was admissible and could be considered in determining whether a rate increase would be granted, and that the Commissioners were within their discretion in asking follow-up questions of the witnesses. To the extent that ORS is now contesting the Commissioners' right to question public witnesses in the course of the public hearings in this case, the parties waived any objection to such questioning by not placing a contemporaneous objection to

the Commissioners' questions into the record. See Cullen v. Prescott, 302 S.C. 201, 204, 394 S.E.2d 722, 724 (Ct. App. 1990) (finding that failure to contemporaneously object precluded argument on appeal that trial judge had, in questioning an expert witness, exhibited lack of neutrality and designed questions to influence the witness to change her recommendation).

ORS further complains that it was not allowed sufficient time to respond to the Commission's September 6 directive requesting additional information, that the Commission failed to afford the parties a fair and impartial hearing because members of the audience laughed and applauded during the hearings conducted in the case, and that the Commission did not take enough time to deliberate before issuing its directive rejecting the proposed settlement. ORS Petition, at pp. 6-7. But ORS did not raise any objections with regard to these topics during the proceedings. The Commission sought to give the parties a fair hearing in conformity with the law[6] and requirements of due process. If the ORS thought otherwise, it was incumbent upon it to object. Lipscomb v. Poole, 247 S.C. 425, 435, 147 S.E.2d 692, 697 (1966) ("If the appellant considered the remarks and conduct of the trial judge prejudicial, then he should have made timely objection in order to preserve the right of review, and the failure to do so amounts to a waiver of the alleged error"). In any event, the Commission is confident that it conducted fair and orderly hearings in this case.

[6] "Hearings conducted before the commission must be conducted under dignified and orderly procedures designed to protect the rights of all parties . . . ." S.C. Code 58-3-225(a).

II. United erroneously argues that the Administrative Procedures Act and the Commission's Regulations confer upon the parties the absolute right to resolve their case by entering into a settlement agreement.

United asserts that the parties of record have an absolute right to dispose of the case by settlement pursuant to the Administrative Procedures Act ("APA") and the Commission's own regulations. See United Petition, at pp. 5-6. The parties cite the APA in support of their argument that the law empowers them to settle a rate case as a matter of right. S.C. Code Ann. §1-23-320(f).[7] However, while Section 1-23-320(f) provides that "informal disposition **may** be made of any contested case by stipulation, agreed settlement, consent order, or default," it does so with the proviso that such informal disposition of the case not be "precluded by law." Id. It also uses permissive, rather than mandatory language. Nothing in the relevant subsection precludes the Commission from rejecting a proposed settlement in the course of discharging its duties "to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. § 58-3-140(A). Since the Commission is charged with the duties of supervising and regulating rates and service of public utilities, it must review all proposed settlements in utility rate proceedings, and it retains the power and authority to reject rate proposals which are not sufficiently supported by evidence of record.

The Supreme Court dealt with a similar issue in Anchor Point, Inc. v. Shoals Sewer Company, 308 S.C. 422, 418 S.E.2d 546 (1992), in which the Supreme Court of

[7] United erroneously cites S.C. Code Ann. §1-23-380(5)(f). United Petition, at p. 5.

South Carolina affirmed the Commission's power to alter sewer rates established in a master deed. The Supreme Court rejected a sewer utility's argument that "the PSC's rate establishment unconstitutionally impair[ed] their right to contract" for sewer rates which were established through its master deed. 418 S.E.2d at 549. However, the Supreme Court found that the Commission had the authority to review the company's rates, because, as a public utility, its operations affected the public interest. Reversing the lower court, the Court found:

> The circuit court held that because Shoals Sewer is not a public utility, it does not affect a public interest and the PSC's rate establishment would impair respondent's right to contract. Since we have found Shoals Sewer is a public utility, it affects a public interest. Therefore, the PSC under the state's police powers may establish rates for Shoals Sewer which would alter the master deed.

418 S.E.2d at 550. Therefore, the Anchor Point ruling supports this Commission's right to substantively review settlement agreements and other contracts proposed by parties, even to the extent of rejecting them if they are not found to be just and reasonable.[8]

United further cites to the Commission's regulations for the proposition that parties have an absolute right to settle a rate case, United Petition, at p. 6,[9] but this

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[8] In upholding the Commission's authority to regulate agreements involving public utilities, the Supreme Court held that "the right to contract is not absolute; it is subject to the state's police powers which may be exercised for the protection of the public's health, safety, morals, or general welfare." 418 S.E.2d at 550, citing Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960).

[9] The Commission's regulations state in pertinent part:

> Final Disposition of Formal Proceedings. Formal proceedings shall be concluded upon the issuance of an order by the Commission or upon a settlement or agreement reached by all parties to the formal proceedings

argument is incorrect. While the Commission's regulations acknowledge that parties may reach settlements, they do not foreclose the independent review of a settlement by the Commission.

In any case, these arguments to the effect that the parties have the absolute right to settle this case without review by the Commission are irreconcilable with the parties' acknowledgment, contained in the plain language of the Settlement Agreement, of the Commission's ultimate authority to independently decide whether the settlement would be approved and adopted. In Paragraph 11 of the Settlement Agreement, the parties acknowledged by implication that the Commission is empowered to decide independently whether the settlement was just and reasonable. The relevant paragraph states:

> The Parties agree to advocate that the Commission accept and approve this Settlement Agreement in its entirety as a fair, reasonable and full resolution of the above captioned proceeding and to take no action inconsistent with its adoption by the Commission. The Parties further agree to cooperate in good faith with one another in recommending to the Commission that this Settlement Agreement be accepted and approved by the Commission. The Parties agree to use reasonable efforts to defend and support any Commission order issued approving this Settlement Agreement and the terms and conditions contained herein.

Settlement Agreement, p. 5, para. 11.

> and formally acknowledged by the Commission by issuance of an order.

26 S.C. Code Ann. Regs. 103-817(D). (At the time the Commission heard this case, the same language was found in 26 S.C. Code Ann. Regs. 103-821.)

The parties further agreed in Paragraph 12 of the same document:

> If the Commission should decline to approve the agreement in its entirety, then any Party desiring to do so may withdraw from the Settlement Agreement without penalty or obligation.

Settlement Agreement, pp. 5-6, para. 12.

The inclusion of these provisions in the parties' Settlement Agreement is inconsistent with the position the parties now argue to this Commission. If the parties did not consider the Commission empowered to independently decide whether the settlement was just and reasonable, the provisions of their Settlement Agreement requiring advocacy on behalf of the Agreement as a "fair, reasonable and full resolution" of the case, and recognizing the Commission's ability to "decline to approve the agreement", would have been unnecessary.[10]

United and ORS also complain that the Commission's order denying approval of the proposed settlement violates the APA's requirement that the order must contain specific findings of fact and conclusions of law. S.C. Code Ann. §1-23-350. The

[10] The South Carolina Supreme Court has affirmed the Commission's authority to decide if rates are just and reasonable, and has held that "the Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." Kiawah Property Owners Group v. Public Service Comm'n of S.C., 357 S.C. 232, 241 n. 5, 593 S.E.2d 148, 153 n. 5 (2004). The parties argue that the Kiawah case is distinguishable from the present case because it involved review of an operating margin, not a return on equity or a settlement agreement. This distinction is irrelevant, as the Commission is empowered – indeed required – to review proposed rates for justness and reasonableness. The parties also imply that the Kiawah case is somehow inapplicable because it was decided prior to the enactment of Act 175. This argument is simply incorrect. Nothing in the amended statutes divests the Commission of the authority to independently determine whether a proposed settlement in a rate proceeding is just and reasonable, and the plain language of S.C. Code Ann. §§ 58-3-140 and 58-5-210 is clear that the Commission's duties and powers with regard to such review remain unchanged.

Commission's order violates neither the letter nor the spirit of Section 1-23-350. The South Carolina Supreme Court has read the APA to require: "An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Where material facts are in dispute, the administrative body must make specific, express findings of fact." Porter v. Public Service Comm'n, 504 S.E.2d 320, 323, 332 S.C. 93, 98-99 (1998) (internal citations omitted), citing, Hamm v. South Carolina Public Service Comm'n, 309 S.C. 295, 422 S.E.2d 118 (1992); Able Communications, Inc. v. S.C. Public Service Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986). The section is violated in those cases in which "[i]t is impossible for an appellate court to review the order for error, since the reasons underlying the decision are left to speculation." Grant v. Grant Textiles, 372 S.C. 196, 202-03, 641 S.E.2d 869, 872 (2007).

In this case, the Commission made clear that its basis for denying approval of the proposed settlement was the parties' failure or refusal to provide the information requested, which the Commission deemed necessary to its efforts to determine the justness and reasonableness of the proposed settlement. The reasons underlying the decision by the Commission are not "left to speculation," as would be proscribed by the APA. All of the facts material to the Commission's decision are included within Order No. 2006-593.

III. United erroneously argues that the Commission violated the Company's right to due process by hearing testimony from customers at public hearings.

A. The Commission did not violate United's due process rights by hearing customer testimony regarding quality of service.

United alleges that its due process rights were violated when the Commission heard and considered non-party customer testimony regarding the quality of its service. United complains that the public witnesses were not required to file written complaints complying with the statutes and rules governing contested cases before the Commission, and that the public witnesses were not made subject to discovery. United contends that its opportunity to file responses to its customers' testimony and to cross-examine public witnesses was insufficient to protect its right to due process. United Petition, at p. 6. The Commission's practice of hearing from the public in rate case proceedings is well established and has been recognized by the state Supreme Court.[11] United's contention that its due process rights were violated was fully discussed in Order No. 2006-593, beginning at page 6. The Commission gave United the opportunity to cross-examine the

[11] See e.g., Patton v. South Carolina Public Service Commission, 280 S.C. at 292-293, 312 S.E.2d at 260 ("The record indicates that a substantial amount of testimony was presented to the Commission by the customers of PPR & M as well as testimony presented by the Director of Appalachian--3 District of DHEC concerning complaints about the quality of service rendered by PPR & M to its customers in the Linville Hills Subdivision."); Hamm v. Public Service Commission, 309 S.C. at 302., 422 S.E.2d at 122 ("As to the effect of the proposed price on customers, the PSC found that the increased rates were reasonable .... In addition, the PSC noted that it had received only five letters opposing a rate increase."); Hilton Head Plantation Utilities v. Public Service Comm'n, 312 S.C. at 449, 441 S.E.2d at 322 ("Thereafter Richard C. Pilsbury (Pilsbury), President of the Property Owner's Association of Hilton Head Plantation, a protestant representing many consumer rate payers, called the Commission's attention to the fact that a substantial portion of the Utility's budget was paid to its corporate parent.").

public witnesses during their sworn testimony, further investigate the testimony of all public witnesses and to respond to their testimony in later filings.

The parameters of due process are expounded upon in Leventis v. South Carolina Dept. of Health and Environmental Control:

> Due process is flexible and calls for such procedural protections as the particular situation demands. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct.App.1998) (quoting Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)). The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Ogburn-Matthews, 332 S.C. at 562, 505 S.E.2d at 603; see also S.C. Const. art. 1, § 22. To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process. Ogburn-Matthews, 332 S.C. at 561, 505 S.E.2d at 603 (citing Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984)).

340 S.C. at 131-132, 530 S.E.2d at 650.

United fails to show that it was either substantially prejudiced by the admission of customer testimony or that it was not allowed the opportunity to be heard in a meaningful way. United not only benefited from representation by counsel while its customers did not; it also enjoyed the ability to cross-examine these witnesses, investigate their claims and file responses to their testimony, and prefile written rebuttal testimony. In contrast, the general ratepayer is much less sophisticated about rate proceedings and formal hearings than the Company. If any advantage existed, it was to the benefit of United.

B. The Commission did not impermissibly circumvent customer complaint procedures by hearing testimony from customers regarding United's quality of service, because these procedures are not the exclusive means of bringing customer service issues to the attention of the Commission in a rate case.

United argues that the Commission "allowing customers to circumvent the established method of resolving complaints exceeds the powers conferred upon the Commission by the South Carolina General Assembly" and therefore the Commission erred in overruling its objections to public testimony regarding quality of service. United Petition, at p. 7. United further complains that it did not receive notice that customers would be allowed to present complaints against the Company at the public hearings, and that this alleged lack of notice violated United's due process rights. United Petition, at p. 7.

United does not cite any customer complaint statute or regulation supporting its claim that formal complaints are the exclusive vehicles for airing of customer complaints. Statutory law does provide for the imposition of fines if a water or sewer utility fails to provide "adequate and proper service to its customers." S.C. Code Ann. §58-5-710. Also the law provides: "Individual consumer complaints must be filed with the Office of Regulatory Staff, which has the responsibility of mediating consumer complaints under the provisions of Articles 1, 3, and 5. If a complaint is not resolved to the satisfaction of the complainant, the complainant may request a hearing before the commission." S.C. Code Ann §58-5-270. However, the PSC's "established customer complaint process" is not found in a statute; it is found in the Commission's regulations.

Customer complaint regulations for water service are found at 26 S.C. Code Ann. Regs. 103-716 and 103-738. These regulations provide:

> Complaints by customers concerning the charges, practices, facilities, or services of the utility shall be investigated promptly and thoroughly. Each utility shall keep a record of all such complaints received, which record shall show the name and address of the complainant, the date and character of the complaint, and the adjustment or disposal made thereof.

26 S.C. Code Ann. Regs. 103-716; and:

> A. Complaints concerning the charges, practices, facilities, or service of the utility shall be investigated promptly and thoroughly. The utility shall keep records of customer complaints as will enable it and the Commission to review and analyze its procedures and actions. All customer complaints shall be processed by the utility pursuant to 103-716 and 103-730.F.
>
> B. When the Commission has notified the utility that a complaint has been received concerning a specific account and the Commission has received notice of the complaint before service is terminated, the utility shall not discontinue the service of that account until the Commission's investigation is completed and the results have been received by the utility.

26 S.C. Code Ann. Regs. 103-738.[12]

Nothing in these regulations indicates that the complaint procedures contained therein are the exclusive means for the Commission's consideration of customer service issues. The process set forth in these statutes and regulations is meant to provide a vehicle for the resolution of individual customer complaints. There is no evidence that either the Commission or the General Assembly intended to foreclose the Commission from considering customer service issues in rate cases; nor is the Commission limited to considering service complaints brought under its individual complaint procedures. Such

[12] Substantially similar regulations for customer complaints against wastewater utilities are found at 26 S.C. Code Ann. Regs. 103-516 and 103-538.

a reading of these statutes and regulations would lead to an absurd result. Under United's interpretation, if a utility received repeated customer service complaints that were resolved through the investigation and mediation of the Office of Regulatory Staff, these issues could not be subsequently considered by the Commission when considering a rate increase. This reading of the law would effectively foreclose consideration of a company's customer service in rate cases.

United's complaint that the Commission "denied [the Company] the opportunity to protect its interests" by "fail[ing] to put [the Company] on notice that its customers would be allowed to present complaints against [United]" at the five public hearings held at various locations around the state in July and August 2006 is unfounded. United Petition, at 7. First, several United customers sent letters to the Commission requesting that the Commission hold public hearings in their local areas for the convenience of the customers who were unable to travel to Columbia to attend. In at least three instances, the customer requesting a local public hearing indicated in his letter that he intended to testify.[13] These letters were posted in the electronic docket for this case on the Commission's web site as well. Furthermore, the Notice of Hearing issued by the Commission Staff stated, "Persons who wish to testify before the Public Service Commission regarding the application may do so at this hearing." The parties were well aware that members of the public would appear and testify at these hearings. In fact, the parties must have known that non-party members of the public would offer the only

[13] The three customers who indicated that they would testify were Thomas E. Taylor of Piedmont, South Carolina, Alvin F. Simpson of Gaffney, South Carolina, and Willard Oldaker of Union, South Carolina. These letters were all sent to the Commission in May 2006. The first of the five public hearings was held in Spartanburg, South Carolina on July 17, 2006.

testimony presented at these hearings, since the parties themselves presented no witnesses to testify.

United complains that the testimony of its customers should be disallowed as "unsubstantiated," and further alleges that the Commission exhibited bias by holding public hearings at which it sought to "ferret out potential quality of service issues for inquiry." United Petition, at p. 8. It should also be noted that, while ORS also seeks reconsideration of Order No. 2006-593, it does not and cannot assert that customer testimony in the public hearings is inadmissible as "unsubstantiated," having previously taken the position at each public hearing that no corroboration or substantiation of such testimony was necessary for it to be admitted into evidence. Transcript, Spartanburg Public Hearing, at p. 8 (July 17, 2006); Transcript, Anderson Public Hearing, at p. 7 (July 18, 2006); Transcript, Gaffney Public Hearing, at p. 6 (July 24, 2006); Transcript, Greenville Public Hearing, at p. 7 (August 7, 2006); Transcript, Union Public Hearing, at p. 6 (August 8, 2006).

Public testimony is a well established part of the rate case process, and we reject the argument that receiving public testimony about a utility's quality of service is in any way improper. See, e.g., Hilton Head Plantation Utilities v. Public Service Commission, 312 S.C. 448, 441 S.E.2d 321 (1994). We further find United's allegations that the Commission was biased against the Company, and that it impermissibly used public testimony to "ferret out" quality of service issues upon which it could base a denial to be unfounded. The Commission acted appropriately and within its discretion in its conduct of the public hearings and handling of witnesses.

IV. The South Carolina Supreme Court, in *Patton v. S.C. Pub. Serv. Comm'n*, recognized that the Public Service Commission may consider quality of service in determining whether rates are just and reasonable.

United contends that Patton v. S.C. Pub. Serv. Comm'n, 280 S.C. 288, 312 S.E.2d 257 (1984), "does not speak to whether 'quality of service' is a proper consideration 'in determining a reasonable rate of return' or a 'just and reasonable operating margin.'" United Petition, at p. 8. United argues that Patton only allows the Commission to "impose 'reasonable requirements ... to insure that adequate and proper **service** will be rendered to customers.'" Id., quoting Patton, 312 S.E.2d at 260 (emphasis in United Petition). United further argues that Patton only holds that withholding an increase until deficiencies are corrected "is a proper means by which the Commission may discharge its authority." Id. United's reading of Patton is unduly restrictive. The Patton Court expressly recognized quality of service as a factor that must be considered, stating "[t]he record in this proceeding indicates that the Commission, **in determining the just and reasonable operating margin** for [the applicant],[14] examined the relationship between the Company's expenses, revenues and investment in an historic test period **as well as the quality of service provided to its customers**." 312 S.E.2d at 259 (emphasis added).

United argues that, in Patton, "1) customer complaints alone were not held to be sufficient to support the denial of rate relief, 2) objective testimony from a DHEC witness

[14] The ORS also takes issue with the applicability of Patton to the facts of this case, asserting that quality of service was deemed in Patton to be a valid basis upon which to fix rates, but not operating margin. Not only is this distinction irrelevant, it is also a misstatement, inasmuch as the Court's holding in Patton acknowledged quality of service to be a consideration both in determining the just and reasonable operating margin, 280 S.C. at 291, 312 S.E.2d at 259, and in fixing just and reasonable rates, 280 S.C at 293, 312 S.E.2d at 260.

that the utility's facility in that subdivision failed to meet DHEC standards was provided, and 3) only a delay in the availability of otherwise allowable rate relief for service to customers in one subdivision resulted." United Petition, at p. 9. However, Patton does not limit the Commission to conditioning prospective rate relief, as United suggests. Instead, the case acknowledges that quality of service is a factor for the Commission to consider when setting rates. Patton does not foreclose the possibility that certain circumstances may warrant the denial of a rate increase due to a utility's failure to prove that it offers adequate customer service. Patton, 280 S.C. at 293, 312 S.E.2d at 260 ("**In this instance**, rather than reduce the rates and charges found reasonable for sewerage service ... because of the poor quality of service, the Commission chose to give the utility company the opportunity and incentive to upgrade the system.") (emphasis added).

United also argues that the Commission's consideration of "quality of service" is inconsistent with its prior orders evaluating the "adequacy" of a utility's service. United Petition, at p. 9. The distinction between "quality of service" and "adequacy of service" is a matter of semantics. The Commission's orders all focus on the question of whether customers are receiving the service they deserve.

United states that there are no quantifiable objective data or scientific criteria in the record to support a finding that its service is not adequate. United further argues that the testimony offered by the public witnesses as to inadequacy of service therefore must be disregarded. United Petition, at p. 10. This assertion is a misstatement of the law, based largely upon United's misreading of an unpublished memorandum opinion issued by the South Carolina Supreme Court in 1995 and an ensuing Circuit Court opinion. See Heater Utilities Inc. v. Public Service Commission of South Carolina, Op. No. 95-MO-

365 (S.C. S.Ct. filed December 8, 1995), cited in Tega Cay Water Service, Inc. v. South Carolina Public Service Comm'n, Case No. 97-CP-40-923 (Richland County Court of Common Pleas, 1998) ("TCWS"). In TCWS, the Commission granted the applicant a low operating margin of 0.23%, which the Commission claimed was justified by evidence of poor quality of service. Citing to Heater, the Court of Common Pleas reversed the Commission's decision, finding that the only evidence of poor service was the testimony of six customers out of a customer base of about 1,500 and that these six customer complaints, standing alone, were insufficient to support the rate of return issued by the Commission.[15]

Heater and TCWS are clearly distinguishable from the case at hand. In Heater, the PSC based its denial of the rate increase *entirely* on a finding of poor water quality derived from the anecdotal testimony of fourteen customers, despite a study conducted by its own staff which found the water to be clear and odorless in the subdivisions about which the customers complained. Slip Op., at 2-3. Similarly, in TCWS, the PSC based a finding of poor service quality solely upon six customer complaints. Slip Op., at 7. In both Heater and TCWS, the reviewing courts found that the Commission's rulings were not supported by substantial evidence.

In the present case, the Commission declined to approve the settlement because United had failed to prove the requested rates to be fair and reasonable based upon many factors, only one of which is quality of service, consistent with the South Carolina Supreme Court's decision in Patton. The Commission heard testimony which gave it cause for concern about quality of service issues, and it inquired about them. Just as the

[15] We discussed the TCWS case in greater detail in Order No. 2006-543, pp. 10-11.

Patton case was one in which certain objective, quantifiable criteria set by DHEC were not met, the applicant in this case also failed to meet some DHEC standards. Additionally, the records and testimony offered by the ORS raised legitimate concerns about compliance with Commission regulations. United contends that the Commission ignored "substantial evidence of record on the issue of quality of service in favor of unsubstantiated testimony." However, as discussed in further detail below, that assertion ignores the fact that the Commission also relied on documents provided by the ORS.[16] The parties refused to provide information which would address these discrepancies in the reports which they submitted. The Commission's decision to deny a rate increase in these proceedings was ultimately based as much on the absence of information pertaining to United's quality of service as on the testimony of complaining customers.

The Commission's actions in the instant case were based upon much more evidence than existed in Heater and TCWS, supra. Here, even though the ORS concluded that United offered adequate service, the Commission found evidence in customer testimony and in the parties' own submissions which showed otherwise. While the Commission relies upon the ORS to conduct audits and investigations and present its findings to the Commission as an aid to the Commission in making regulatory decisions, it is not obligated to accept ORS's conclusions as a matter of course where other evidence might lead to a different result. It is within ORS's purview to represent the public interest before the Commission, but it is the Commission's authority to deliberate and then judge whether public interest standards are met.

[16] See discussion of conflicting evidence regarding DHEC reports at pp. 47-49.

V. In *Hilton Head Plantation Utilities v. Public Service Commission*, the South Carolina Supreme Court authorized the Public Service Commission to hear and rely upon non-party public witnesses in the course of utility rate proceedings.

The Public Service Commission is within its statutory authority to hold public hearings and consider public testimony. This authority is derived from the General Assembly's broad mandate for the Commission to ascertain and fix just and reasonable standards, classifications, regulations, practices, and *measurements of service* necessary to supervise and regulate the rates and service as well as determine a fair rate of return for public utilities. S.C. Code Ann. §§58-3-140 and 58-5-210 (1976). The General Assembly gave the Commission the discretion to determine how to consider these factors when setting rates. Over the years, the Commission has relied on the public hearing process to gather facts from the utility's customers; and this practice has been recognized by the South Carolina Supreme Court as supporting its decisions. See Hilton Head Plantation Utilities v. Public Service Commission, 312 S.C. 448, 441 S.E.2d 321 (1994).

United argues that the Commission's reliance on Hilton Head is mistaken in several respects. The Company argues: a) the Commission was mistaken in relying on Hilton Head for the proposition that its "duty to independently review an application has been recognized by the Supreme Court" (Order No. 2006-593, at p. 14, United Petition, at pp. 14-15); b) the Commission was mistaken in relying on the case for the proposition that it may rely on the testimony of public witnesses when denying rate relief (Order No. 2006-593, at pp. 15-16; United Petition, at pp. 15-16); c) that the Hilton Head case did not include a holding that the Commission "must review and analyze intercompany dealings and determine if they are reasonable" (Order No. 2006-593, at pp. 14-16; United Petition, at p. 16); and (d) that the Commission did not seek out information on its own

motion in the Hilton Head case. (Order No. 2006-593, at p. 16, United Petition, at pp. 16-17). Each argument is addressed herein.

In Hilton Head, the utility filed an application with the Commission seeking approval of an increased schedule of rates and charges for water and sewer services. The Commission's staff conducted an audit of the utility's books and records and physically inspected its operations and facilities. A public hearing was held on the matter before the Commission. The utility presented a witness to testify about the company's financial condition, its request for rate relief, and the utility's financial exhibits, and another witness testified about its operations. The Commission's staff presented a witness who testified about his audit of the company's books, and explained the staff accounting report. He did not challenge the reasonableness of any expenses for the test year. Hilton Head, 376 S.C. at 449, 441 S.E.2d at 321.

However, during the hearing, Richard C. Pilsbury, the President of the Property Owners Association of Hilton Head Plantation, who had not intervened and was not a party of record, testified as "a protestant representing many consumer rate payers," and called the Commission's attention to the fact that a substantial portion of the utility's budget was paid to its corporate parent. Hilton Head, 376 S.C. at 449, 441 S.E.2d at 322. Pilsbury "submitted that the expenses were questionable, and in effect invited the Commission to take into account the fact that certain transactions might not have been conducted at arm's length." Id.

The Commission found that Pilsbury's statement raised questions about less-than-arms-length transactions taking place between the utility and its parent. Id. The Commission concluded that these expenses brought into question the entire amount of

expenses required by the company as legitimate operation and maintenance expenses which were passed on to the company's ratepayers, and the rates proposed by the company to collect these monies. The Commission also held that the record before it failed to provide the answers to this question. Id. The Commission denied the proposed rates as unjust and unreasonable

The Supreme Court affirmed the Commission on appeal. The utility argued that the evidence before the Commission was insufficient to support its decision to refuse the company's application for the rate increase sought. The Supreme Court disagreed and held that the utility bears the burden of proof with regard to the reasonableness of expenses incurred. Hilton Head, 312 S.C. at 450, 441 S.E. 2d at 323. The expenses were presumed reasonable when incurred in good faith, but when payments were made to an affiliate, the Court held that a mere showing of the actual payment did not establish a *prima facie* case of reasonableness. Id., 312, S.C. at 450-51, 441 S.E. 2d at 323. The Court also held that charges arising out of intercompany relationships between affiliated companies should be scrutinized with care, and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the Commission, allowance is properly refused. Id., 312, S.C. at 451, 441 S.E. 2d at 323.

The Court declined to substitute its own judgment for that of the Commission. Id. The Court noted that the Commission had, in essence, invited the utility to file a new application and that the utility could conceivably be entitled to some increase, although neither the Commission in the first instance, nor the Circuit Court on review, was in error in refusing the rate increase sought by the utility. The Court said that the matter could

either be pursued on remand or by way of new application, but that the most logical way to pursue it was on remand so that the utility could have an ample opportunity to explain its expenditures and justify them. Finally, the Court advised that the Commission could receive any other evidence and that the Commission should establish an operating margin as required by statute. Hilton Head, 312 S.C. at 452, 441 S.E. 2d at 323.

United is correct in stating that the Commission did not inquire into United's affiliated transactions in the present case as it did in Hilton Head, but this argument misses the point. United Petition, at pp. 16-17. The Hilton Head holding is significant here because, in that case, the South Carolina Supreme Court upheld the Commission's decision to reject the utility's request for a rate increase, a decision which was prompted by the complaint of a non-party witness. Hilton Head, 312 S.C. at 451, 441 S.E.2d at 323 ("neither the Circuit Court nor the Commission erred in refusing the rate increase sought"). The Supreme Court recognized that if additional information was provided, a rate increase might be justified and remanded the case so that the utility could have the opportunity to justify its expenditures. Hilton Head, 312 S.C. at 452, 441 S.E.d at 321. Similarly, the testimony of non-party, customer witnesses prompted the Commission to inquire into several aspects of United's application.

The Commission's rulings in this case, which afforded United an opportunity to justify its requested rates, rather than rejecting them outright, is consistent with the Hilton Head holding. First, in Hilton Head, the Supreme Court recognized that a non-party, such as a protestant, may raise an issue before the Commission for investigation. Second, Hilton Head supports the proposition that if the Commission is not satisfied that the record supports a rate increase request in a case, the Commission does not have to grant

that rate request, and it may receive additional information in a new application. The Supreme Court recognized that the Commission could receive information in a new application, or within the existing case, and facilitated the receipt of such information by remanding the case so that the utility could provide additional information responsive to the Commission's concerns regarding affiliated transactions. Id.

United contends that Hilton Head does not support inquiry by the Commission into the affiliate expenses at issue in that case. According to United, the Commission's order in Hilton Head had relied solely upon the utility's application, the staff's report, and the unsolicited testimony of the protestant witness when it concluded that the expenses should not be allowed. United Petition, at pp. 16-17. However, United's characterization of the case is incorrect. One of the affiliate transactions referred to by the Commission in its Hilton Head order was the payment of $90,956 for transfer of treated effluent into the Cypress Conservancy. Order No. 92-115, at p. 5. The Commission noted that the contract embodying this arrangement had never been filed with the Commission for approval, pursuant to Commission Regulation 103-541, and that it had not reviewed or approved a contract for a rental charge of $144,000 for land leases which should have been submitted for approval under the same regulation. Order No. 92-115, at pp. 5-6. The Commission's order indicated that the contracts for these affiliated transactions had not been approved subject to Commission regulation, and that having the contracts before it would have been helpful in investigating the propriety of the claimed affiliate transactions. Since the company did not submit the appropriate evidence, and the Commission held that affiliate transactions affected the entire amount of operation and maintenance expenses, the rate increase request was denied. However, there was an

implicit invitation, as the Supreme Court recognized, for the utility to submit the information. In the case at bar, the invitation to present additional information was explicit, but it was ignored by all parties, with a similar result. Had the parties provided the additional information requested by the Commission in the present case, it is possible that the Settlement Agreement would have been approved, as well as the rate increase.

United further complains that, at page 15 of Order No. 2006-593, the Commission misattributed the following language as a quotation: "[t]he PSC must review and analyze intercompany dealings and determine if they are reasonable." United Petition, at p. 16. The actual holding of the Court was as follows:

> Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care, and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the Commission, allowance is properly refused.

Hilton Head, 312 S.C. at 451, 441 S.E. 2d at 323.

While United is correct in pointing out the Commission's error in including this paraphrased language within a block quotation, the error was inadvertent and had no effect upon the Commission's analysis.

VI. The Commission's decision to reject the settlement was consistent with the practices embodied in the Commission's settlement policy and its regulatory authority.

United further asserts that the Commission erred to the extent that its decision to deny approval of the settlement was premised upon the parties' failure to present evidence supporting the settlement proposal in accordance with the Commission's Settlement Policies and Procedures. United contends that the Settlement Policies and

Procedures do not have the force and effect of law since they were not promulgated in accordance with the rulemaking provisions of the Administrative Procedures Act. United Petition, at p. 17.

The Settlement Policies and Procedures at issue were published by the Commission in an effort to give guidance to the parties it regulates and to inform the public. In order to ensure that the written policy was effective and consistent with applicable law and regulations, the Commission published its proposed policy on March 21, 2006, and invited comments and suggestions from all regulated utilities and interested parties. On June 13, 2006, after giving notice to all regulated entities and interested parties and reviewing comments from the regulatory community, the Commission issued its "Settlement Policies and Procedures."[17] The Settlement Policies and Procedures refer to the Commission's "statutory duty of ensuring that cases brought before it are resolved in a manner consistent with the public interest," and makes clear that proposed settlements will be evaluated by the Commission on the basis of whether they are "just, fair and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy." Settlement Policies and Procedures, p. 1, Pt. IV. The Settlement Policies and Procedures also specifically provide that when a settlement is proposed, "the Commission may accept the settlement, reject the settlement, or require the further development of an appropriate record in support of a proposed settlement." Id.

Following the issuance of the initial statement of the Commission's Settlement

[17] Attached as Exhibit A and posted on the Commission's website at: *http://www.psc.sc.gov/laws/settlement/PSC%20Settlement%20Policies%20revised%206.13.2006.pdf.*

Policies and Procedures and request for comments on March 21, 2006, ORS responded with a letter supporting the Commission's efforts, stating, in part:

> The Office of Regulatory Staff ("ORS") has reviewed the proposal and believes these procedures to be fair, reasonable and provide helpful guidance to the parties. ORS appreciates the Commission's thoroughness, insight, and attention to this matter, and we support the adoption of these policies.

Letter from C. Dukes Scott to Charles L.A. Terreni (April 3, 2006).

Only one other entity, South Carolina Electric & Gas Company, offered comments on the matter. United offered no comments, either after the Commission's initial issuance of the policy, or after the publication of the revised policy on June 13, 2006. Neither United nor ORS has contended that the Commission's Settlement Policies and Procedures were in any way unlawful or improper prior to the issuance of Order No. 2006-593 in this case. To the contrary, United and ORS filed the Explanatory Brief and Joint Motion for Settlement Hearing and Adoption of Settlement Agreement pursuant to the June 13, 2006 revised Settlement Policies and Procedures. Explanatory Brief, p. 1.

United now argues that the Commission cannot follow the Settlement Policies and Procedures because they were not promulgated as regulations. The Commission has never asserted that the document itself constitutes a regulation, nor does the Commission believe that it is necessary for it to promulgate a regulation for this purpose. Instead, the document is a statement of the policy employed by the Commission and is intended to provide guidance on how the Commission will evaluate settlements consistent with its statutory authority. We believe this Commission has the authority to establish general procedures for the consideration of settlements without promulgating a regulation.

VII. The Commission's rejection of the settlement was not arbitrary and capricious, and was based on the record of this case.

United also cites the Commission's decision in In re Application of Tega Cay Water Service, Inc., Docket No. 2006-97-WS, Order No. 2006-582 (2006) ("TCWS" or "the TCWS case"), as evidence that the Commission's action in this case was arbitrary and capricious. In that case, Tega Cay Water Service, Inc. ("TCWS") also refused to present the Commission with requested evidence, but a proposed settlement of that case was nevertheless approved. A review of this Commission's rationale for accepting the settlement in the TCWS case demonstrates that the Commission did not exercise its decision-making authority in an arbitrary manner. Contrary to the situation in the present case, in TCWS, the Commission found that its particular concerns could be adequately addressed outside the rate case docket. Order No. 2006-582, p. 11. The fact that this case and TCWS were decided under somewhat similar circumstances but yielded different results does not demonstrate arbitrariness or capriciousness. An administrative decision is arbitrary if it is without rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Converse Power Corp. v. South Carolina Department of Health and Environmental Control, 350 S.C. 39, 564 S.E.2d 341, (Ct.App. 2002), quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct.App. 1985).

There are significant distinctions between this case and TCWS. First, although there was evidence of water loss in TCWS, an ORS witness testified that the water losses presented only a potential indirect effect on customers' bills. Accordingly, we held that

this issue may be dealt with administratively and should not prevent the Commission from approving the Settlement Agreement. See Order No. 2006-582, pp. 10-11. Second, although there were some customer complaints, the Commission was convinced that these could also be addressed administratively through such means as reports and inspections pursuant to S.C. Code Ann. Sections 58-3-190 and 58-3-200 (Supp. 2006). Id., p. 11. Third, fewer overall complaints existed with TCWS than with United, and the terms of the proposed settlement were more favorable to all who would be impacted by a rate increase. The Commission's decisions in the TCWS rate case and the present case are each based on the particular facts before it.

VIII. The Commission's requests for information were reasonable and appropriate.

A. The Commission's request for information on the frequency of sewer backups and the Company's response to these incidents was appropriate.

During the public hearings, the Commission heard testimony relating to sewer backups. James Vickery of Anderson, South Carolina testified about multiple sewer backups affecting his property and that of his neighbors. Transcript, Anderson Public Hearing, at p. 19 (July 18, 2006). Sara Ford of Simpsonville, South Carolina testified about sewer problems in the neighborhood where she and her daughter and son-in-law live. Transcript, Greenville Public Hearing, at p. 19 (August 7, 2006). Virginia Grey of Piedmont, South Carolina testified about her experience with sewer line problems. Transcript, Greenville Public Hearing, at pp. 40-41 (August 7, 2006). Mr. Darrell Waters and Mr. Gene Matthews of Union, South Carolina testified about sewer problems in their golf course community. Transcript, Union Public Hearing, at pp. 10-15, 26-27.

After hearing public testimony complaining of sewer backups and the Company's response to these problems, the Commission asked the Company how many complaints of sewer backups were received within the test year and how these were resolved. If the Commission were not permitted to follow up on issues raised in public testimony in this manner, public testimony would be rendered largely worthless. We find no error in these inquiries.

United argues that the Commission erred in considering its failure to provide requested information regarding sewer backups as a basis for denying rate relief. United also complains that Order No. 2006-593 does not cite any customer testimony regarding the number, location or cause of sewer backups, and other details. United Petition, at p. 19. United apparently believes that the Commission cannot lawfully follow up customer complaints of sewer problems with its own inquiries unless the customer complaints include very specific details and corroboration independent of mere testimony given under oath. We reject this argument.

The Commission also posed questions regarding the efforts by United to prevent sewer backups, what measures the Company employed to prevent sewer problems, and how they compare to industry standards. These questions were proper whether in response to comments from the public or not. Sewer backups are a common concern of utility customers and, therefore, a legitimate source of inquiry in these proceedings. If United does not have a high incidence of backups or of problems responding to them, as it implies in its petition, this could be a factor that would actually support its request for higher rates. These questions are a legitimate line of inquiry, given the Commission's charge to consider the quality of a company's service when considering an increase to its

rates and charges. See, Patton v. Public Service Comm'n, 280 S.C. 288, 312 SE 2d 257 (1984).

United alleges that Order No. 2006-593 ignores the stipulated testimony offered in the Settlement Agreement with respect to the adequacy of United's service and its maintenance procedures, including the report of ORS with respect to customer complaints. United Petition, at p. 19. However, the stipulated testimony failed to provide any of the requested information about sewer backups. The Company has not provided the Commission with a complete picture of the situation involving its sewer backups, including the frequency of such incidents and the timeliness and adequacy of the Company's responses to them. The Commission was within its authority to request additional information, and absent sufficient evidence that this aspect of United's service is adequate despite other evidence in the record to the contrary, the Commission was within its rights to deny the proposed rate increase.

B. The Commission appropriately considered the fairness of United's flat fee tariff for sewerage service.

On September 6, 2006, the Commission requested that the parties explain why the Commission should find that their proposed flat rate sewerage billing scheme was just and reasonable, and why it was superior to one based on individual usage. Commission Directive, Sept. 6, 2006; Order No. 2006-593, at p. 19. We heard testimony to the effect that the Company's flat-rate sewer charge was unfair because it charged the same amount for a household of one person as for a household of many. See, e.g., Testimony of John M. Davis, Jr., Transcript, Spartanburg Public Hearing, at p. 16 (July 17, 2006) ("I'm just a one-person family … I pay the same thing as people with … six, ten people in a house

...."); see also, Testimony of Carolyn Smith, Transcript, Spartanburg Public Hearing, at p. 32 (July 17, 2006); Testimony of Andrew Wiseman, Transcript, Gaffney Public Hearing, at p. 50 (July 24, 2006); Testimony of Robin Johnson, Transcript, Greenville Public Hearing, at pp. 11, 13 (August 7, 2006).[18] The parties failed to provide any information in response to our questions about this issue.

United argues it was inappropriate for the Commission to inquire whether a flat rate billing structure was proper. It argues that the Commission failed to recognize that its rates are presumptively valid and that they were not challenged by a party of record. The Commission disagrees.

United asserts that only four of 1,800 sewer customers expressed concern about the fairness of the Company's flat rate sewer billing structure, and that Order No. 2006-593 was therefore inconsistent with the holding in the Heater Utilities case. Heater Utilities, Inc. v. Public Service Comm'n of South Carolina, Memorandum Opinion No. 95-MO-365 (Sup. Ct. of S.C. 1995). United also relies upon ORS's endorsement of the flat rate sewer structure to buttress this argument.

The Commission did not discuss whether United's rates are presumptively valid in its Order. However, as discussed above, a presumption of validity does not mean that the Commission cannot question the fairness of the Company's rate structure, which is the essence of United's argument. Rather, that presumption would be considered as part

[18] ORS states that flat-rate sewerage billing was not at issue in this case because it was only raised as an issue by North Greenville University in pre-filed testimony which was ultimately not submitted into the record by the parties once they arrived at their settlement. ORS Petition, at p. 9. ORS would have us ignore the testimony of those customers who raised the issue of whether flat-rate billing was appropriate during the public hearings. We decline to ignore these public witnesses.

of the Commission's deliberation. This process was thwarted by United's absolute refusal to address the issue of flat rate billing at all.

We reject United's argument that our inquiry constituted error. First, the Commission only requested information on the issue of flat rate billing. The Commission did not change the flat rate billing structure. Second, the Commission's request for information from parties is different from the Commission's denial of a rate increase in Heater, which was based exclusively on testimony from customers of the utility regarding quality of service. Third, the Commission is entitled to consider the fairness of the utility's rate structure, regardless of the number of customers who may complain about it.

The Commission noted that the flat rate billing structure concerned several of United's customers, and this initially prompted its consideration of the issue. However, issues such as the fairness of a rate structure need not be raised by a certain percentage of the Company's customers to be worthy of consideration. As the Commission noted, there are divergent opinions among various jurisdictions about the desirability of flat rate designs. Order No. 2006-593, at p. 19. It was entirely appropriate for the Commission to consider this issue, and United's motion to reconsider this ground for its decision is denied.

C. The Commission appropriately requested information regarding United's billing and collection practices.

The Commission's September 6, 2006 Directive included an inquiry about customer complaints pertaining to billing and collections practices. Several witnesses testified that they were not regularly billed for sewer services. Tammy Sell of Spartanburg County testified that she was not billed for several months after she

purchased her home, and that the first notice she received of her sewer charges was a disconnection notice. Transcript, Spartanburg Public Hearing, at p. 20 (July 17, 2006). Ms. Sell also testified that she was billed for the arrearages of the prior occupant of her home, and that she had seen orange tags placed on mailboxes in her neighborhood by United agents or employees to indicate that the occupants of those homes were in arrears in paying their sewer charges. Transcript, Spartanburg Public Hearing, at pp. 19-26 (July 17, 2006). Beverly Wade, Paul Houle, Ponease Gosnell, and Margaret Wilson also testified that they did not receive prompt notice that their sewer provider was United Utility Companies, and that they were required to pay back charges for several months' service when they were so notified. Transcript, Spartanburg Public Hearing, at pp. 35-42, 44-45, 47, 52 (July 17, 2006). Similarly, Ms. Cheryl Wright of Gaffney, South Carolina testified that she had been in her home for a year without being billed for sewer service when a United representative knocked on her door and demanded that she pay $500 immediately or have her sewer service shut off. Ms. Wright also testified that United has not billed her regularly or consistently. Transcript, Gaffney Public Hearing, at pp. 14-15 (July 24, 2006).

Bruce Haas explained in his rebuttal testimony, which was attached to the Settlement Agreement as Exhibit A, that the Company billed customers for up to six months' sewer service upon discovery that a new customer had moved into a previously vacant home, but no witness was presented at the hearing to answer Commission questions about the Company's handling of these situations, to offer more detailed explanation of the Company's actions, or to provide further supporting evidence. Haas Rebuttal Testimony, at pp. 4-5. With regard to the allegation of United employees

placing orange tags on mailboxes to indicate delinquency, United first asserts that the testimony of one witness is insufficient to trigger further inquiry by the Commission, and then, while disclaiming any admission that it engaged in such a practice, defends it as a "reasonable manner in which to collect past due bills." United Petition, at p. 25. United also argues that the billing and collections practices complained of by its customers are not unconscionable under the terms of Section 37-5-108 of the South Carolina Consumer Protection Code. The Commission did not find that United's collections practices are actionable under the Consumer Protection Code, or that United's collections practices were unconscionable as a matter of law. Instead, the Commission observed that the General Assembly has recognized the public disclosure of information affecting customers' reputation for creditworthiness as unconscionable in other contexts, such as with regard to consumer credit transactions. S.C. Code Ann. §37-5-108(5)(d). We characterized the allegations with regard to United's collections practices as "disturbing," and "reflect[ing] poorly on the Company's service." Order, at p. 21. We requested more detailed information about the Company's collections practices, but United declined to provide the detailed information we sought.

The Commission rejects United's assertion that its inquiry about billing and collections practices constituted error. The Commission was well within its rights in asking the Company whether it had received complaints about its billing and collections practices, whether it was aware of the allegation with regard to the placement of the orange tags on mailboxes, and what measures the Company employed to ensure that its agents and employees engaged in fair and lawful collections practices. We reject the

notion that there is some threshold number of customer complaints which must be reached before we are permitted further inquiry.

D. The Commission appropriately requested information regarding United's DHEC violations.

Commission Regulations 26 S.C. Code Ann. Regs. 103-514.C and 103-714.C require water and wastewater utilities to provide notice to the Commission of any violation of PSC or DHEC rules which affect the service provided to its customers. In her direct testimony, ORS witness Dawn M. Hipp testified that United had failed to comply with Regs. 103-514.C and 103-714.C by not filing a copy of a Consent Order which it had executed with DHEC pertaining to violations of the Pollution Control Act at its Briarcreek I wastewater treatment facility. Hipp Direct Testimony, at pp. 5-6 (July 31, 2006). United now complains that the Commission erred by requesting information concerning the Company's compliance with the Commission's reporting requirements. We discern no error.

The Company argues that under 26 S.C. Code Ann. Regs. 103-514.C and 103-714.C, it was not required to report the DHEC violations in question to the Commission because they did not affect service to customers. United takes the position that, under the regulations, it has the sole discretion to determine if service has been affected by a DHEC violation, thereby triggering the reporting requirement. According to United, the Commission does not have the authority to verify that the required self-reporting has taken place. We reject this reading of the regulation. While the regulation does place the primary reporting responsibility on the company, whether a violation triggers a reporting obligation is subject to verification by the ORS or the Commission. In addition, Hipp

testified that during the ORS inspection of United's facilities, all wastewater collection and treatment systems were operating adequately and in accordance with DHEC rules and regulations, but the ORS Wastewater System Inspection Reports included in Exhibit DMH-4 to her testimony indicate a DHEC Compliance Rating of "unsatisfactory" for the Company's wastewater systems in the Chambert Forest I and II and Valleybrook subdivisions. Hipp Direct Testimony, Exhibit DMH-4, at pp. 4, 10 (July 31, 2006). This discrepancy was cause for concern by the Commission, and the Commission believed it warranted further inquiry. The Company, however, insisted that the Commission's inquiries with regard to its DHEC compliance record is not a relevant consideration with regard to quality of service. We disagree, and find that a company's record of DHEC infractions may be considered in the context of an application for a rate increase. We also reject United's argument that the ORS should have the last word on the subject of its compliance with DHEC regulations. Without more information, the Commission could not adequately consider the quality of service provided by the Company. Our ability to consider the implications of the unsatisfactory DHEC ratings in this case was severely hampered by the parties' failure to cooperate in this matter by furnishing the requested information. In part as a consequence of the parties' refusal to provide us with the information we needed, we denied the proposed rate increase.

ORS argues, for the first time on reconsideration, that the Commission mistakenly perceived an inconsistency between Hipp's testimony and her attached exhibits. ORS now claims that Hipp's testimony of the Company's compliance with DHEC regulations pertains to the "current" state of United's operations, and that the exhibits reflected past violations. ORS Petition, at p. 12. However, this ignores the fact that Hipp provided

prefiled testimony that did not spell out the explanation for the apparent discrepancy, and then ORS refused to provide additional information or even an explanation when the Commission asked for additional information in an attempt to resolve the issue. We reject ORS's argument and remain unconvinced by its recent explanation. Hipp's testimony included a finding that United had failed to make reports of violations pursuant to 26 S.C. Code Ann. Regs. 103-514.C and 103-714.C. These instances in which Hipp testified that United failed to make required reports to the Commission are no less problematic even if one assumes that the Company had since remedied the problems triggering the reporting requirement. Furthermore, to the extent that ORS now claims that United had remedied the deficiencies noted in Exhibit DMH-4, it was incumbent upon ORS to make Hipp, or another knowledgeable witness, available in the hearing to clarify and/or correct her direct testimony. It is unpersuasive for ORS to allege after the fact that the Commission had misconstrued Hipp's testimony and exhibits, when ORS and United made the deliberate decision not to make Hipp available to the Commission at the settlement hearing.

IX. The Commission's denial of rate case expenses was justified.

In its petition for reconsideration, the ORS complains that, by declining to approve the settlement agreement, the Commission wrongfully declined to order a rate increase to defray the compensation and expenses of Dr. J. Randall Woolridge, whom ORS retained to help evaluate United's rate relief application and provide expert testimony as necessary. ORS Petition, at pp. 4-5. In Order No. 2006-338, issued June 8, 2006, we approved a consent order, entered into well before the parties agreed to settle the rate case, in which United agreed to compensate ORS in an amount "**not to exceed**

$7,500" for expert witness fees and an amount "**not to exceed** $830" for expert travel expenses. Order No. 2006-338, at p. 1 (emphasis added). United's agreement to compensate ORS for its expert witness expenses was not contingent upon its success in the rate case. In their subsequent settlement agreement, the parties neither disclosed to the Commission the actual expenses incurred in connection with Dr. Woolridge's services, nor specifically requested payment of these expenses. Indeed, the settlement agreement entered into by the parties did not mention Dr. Woolridge at all. Even now, the parties have produced no evidence documenting the actual expenses incurred in connection with Dr. Woolridge's services.

Moreover, even after the Commission issued its directive of September 8, 2006 rejecting the proposed settlement based upon the insufficiency of the evidence presented, but offering the parties the opportunity to present additional evidence supporting the settlement at a subsequent hearing, the ORS and United declined to present any additional information and insisted that the Commission make a final ruling based upon the existing evidence in the record. The ORS's letter to the Commission of September 20, 2006 stated:

> ORS would assert that it has presented to the Commission all evidence that it believes is necessary for the Commission to issue an order on the Settlement Agreement, no additional evidence in the docket is needed inasmuch as the ORS would not offer any evidence beyond that already presented to the Commission, and therefore no further hearing is necessary.

Letter from Nanette S. Edwards to Charles L.A. Terreni (September 20, 2006). United's counsel likewise advised that the Company would offer no further evidence in a letter

which included substantially identical language. Letter from John M.S. Hoefer to Charles L.A. Terreni (September 20, 2006).

Furthermore, after the settlement was denied, the ORS did not petition for payment of Dr. Woolridge's fees and expenses, even though the Commission explicitly gave the parties the opportunity to seek alternative relief after approval of the settlement was declined. Commission Directive, September 8, 2006. Now, for the first time in its petition for reconsideration, ORS argues that by declining to approve the settlement, the Commission contradicted its earlier order approving Dr. Woolridge's employment and the Company's payment of his fees and expenses. While we do not doubt that the ORS may have incurred expenses in connection with Dr. Woolridge, there is no evidence in the record to establish them, and this is not the appropriate way to seek their payment.

X. The authority to regulate public utilities in the public interest, delegated to the Commission by the General Assembly, remains vested with the Commission after the enactment of Act 175.

United and the ORS argue that the Commission is without authority to make its own determination of the public interest. United argues that "[t]here is nothing contained in Chapters 3 or 5 of Title 58 of the Code of Laws of South Carolina which authorizes the Commission to "act in the public interest." United Petition, at p. 30. Similarly, ORS asserts:

> [T]he Commission has no statutory authority to ascertain, represent, or determine the public interest in water or wastewater rate proceedings. The Commission's enabling legislation is devoid of any reference or directive instructing or empowering the Commission to ascertain, represent, or determine the public interest in water or wastewater cases. There is no statute in either Chapter 3 or Chapter 5 of Title 58 of the Code of Laws of South

> Carolina which authorizes the Commission to act in or make a determination regarding 'the public interest.'

ORS Petition, at pp. 17. The parties argue that ORS is now "empowered to act as a regulator"[19] and that Act 175 implicitly repealed the Commission's regulatory authority to determine whether the public interest would be served by a settlement.[20] Both United and ORS, without citing any support for their position, state that the determination of whether the public interest would be served is "exclusively" within the statutory authority of ORS.[21] We disagree. The Commission's authority to consider the public interest in the course of a rate case is derived from the state constitution. The South Carolina Constitution provides that:

> The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public **as and to the extent required by the public interest.**

S.C. Const. Art. IX, §1 (emphasis added).

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[19] See United Petition, at p. 30.

[20] Id.; ORS Petition, at pp. 17-18. We note that South Carolina law does not support repeal by implication except where conflicting statutes cannot be reconciled or harmonized. It is well established that:

> The repeal of a statute by implication is not favored, and is to be resorted to only in the event of an irreconcilable conflict between the provisions of two statutes," and "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.

Eagle Container Co., LLC v. County of Newberry 366 S.C. 611, 628, 622 S.E.2d 733, 741-742 (Ct.App. 2005), citing In the Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980), (citing City of Spartanburg v. Blalock, 223 S.C. 252, 75 S.E.2d 361 (1953)).

[21] United Petition, at p. 30; ORS Petition, at p. 17-18.

Therefore, all regulation of public utilities must be conducted in a manner consistent with the public interest. The state Supreme Court has recognized this provision as the underlying basis of the Public Service Commission's authority to regulate public utilities. Duke Power Co. v. S.C. Public Service Comm'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985). The Commission's determination of whether a proposed rate increase is just and reasonable is consistent with this mandate.

In this case, the parties have attempted to distinguish the Commission's statutory authority to determine just and reasonable rates from the authority to authorize rates that are consistent with the public interest. The distinction is illusory, because the determinations as to whether rates are just and reasonable and as to whether they are in the public interest are inextricably related. Utility rates must be consistent with the public interest to be deemed just and reasonable, and vice versa.

The Commission is statutorily "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State. S.C. Code Ann. §58-3-140(A) (Supp. 2007). The parties' arguments that the Commission cannot consider its judgment with regard to the public interest in discharging its duties and that the Commission is bound to accept the ORS's determination of whether the public interest is served by a proposed settlement would effectively prevent the Commission from discharging its statutory duties. In Citizens Action Coalition of Indiana, Inc. v. PSI Energy, Inc., 664 N.E.2d 401 (Ind. App. 1996), the Indiana Court of Appeals heard arguments remarkably similar to those presented by

the parties in this case. There, the appellants sought reversal of the Indiana Utility Regulatory Commission's decision rejecting a proposed settlement which had been agreed to by the parties to the case, including the Office of the Utility Consumer Counselor ("OUCC"), the state agency designated by statute as the representative of the public interest. On appeal, the intervenor Citizens Action Coalition ("CAC") argued that "the commission exceeded its authority by rejecting a reasonable settlement agreement and by entering an order that is contrary to law," Citizens Action 664 N.E.2d at 404, and that "the commission deserted its role as an impartial fact-finder and, while purporting to protect the interests of the ratepayers, rejected an agreement which had been accepted by the statutory representative of the rate paying public." Citizens Action 664 N.E.2d at 405. The Court of Appeals summarized:

> Essentially, CAC's position is that the commission acts merely in a ministerial manner and must accord a settlement reached by the CAC and the OUCC a strong presumption of approval. Although we recognize the strong public policy favoring settlement agreements, we reject the notion that the commission must accept an agreement endorsed by the OUCC without determining whether the public interest will be served by the agreement.

Id.

In upholding the Indiana Commission's rejection of the settlement, the Court of Appeals distinguished the role of the commission from that of a civil trial court:

> We note at the outset that "settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. See Pennsylvania Gas & Water Co. v. Federal Power Com'n, 463 F.2d 1242, 1246 (D.C.Cir.1972). While trial courts perform a more passive role and allow the litigants to play out the contest, regulatory agencies are charged with a duty to move on their own initiative where and when

> they deem appropriate. Id. Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. Cajun Elec. Power Coop., Inc. v. F.E.R.C., 924 F.2d 1132, 1135 (D.C.Cir.1991). Indeed, an agency may not accept a settlement merely beeause the private parties are satisfied; rather, an agency must consider whether the public interest will be served by accepting the settlement. C. Koch, Administrative Law and Practice § 5.81 (Supp.1995).

Citizens Action, 664 N.E.2d at 406.

The court was not persuaded that the settlement agreement was due any special deference by virtue of the acquiescence of the Office of the Utility Consumer Counselor ("OUCC"). The Indiana Court of Appeals concluded, in relevant part, "[W]e reject the notion that an agency is absolved from considering the public interest ... when a statutory representative is provided to represent the public interest. The commission still must review the agreement under a reasonableness standard." Id.

The rationale of Citizens Action applies here. Like the OUCC, the ORS is charged by statute with the duty of representing the public interest in matters before the state utility commission. Like the OUCC, the ORS agreed to a settlement that was later rejected by its state's utility regulatory commission. Just as the Indiana Court of Appeals found that the Indiana Utility Regulatory Commission was not bound to accept a settlement agreed to by the OUCC in spite of the OUCC's statutory designation as representative of the public interest, the South Carolina PSC is not bound to accept every settlement agreed to by the ORS.

In spite of United's argument to the contrary, Bryant v. Arkansas Public Service Comm'n, 46 Ark.App. 88, 877 S.W.2d 594 (1994), also supports the Commission's holding in this case. In Bryant, the Arkansas PSC approved and adopted a settlement

over the objection of the Consumer Utilities Rate Advocacy Division of the Arkansas Attorney General's Office ("the Arkansas CURAD"). The Arkansas CURAD appealed, arguing that that it was "the sole party to the proceeding representing the interests of the Arkansas ratepayers and that no authority exists giving the Commission permission to approve a stipulation over the ratepayers' objections." 877 S.W.2d at 598. The Arkansas Court of Appeals found that the Arkansas CURAD did not have "veto power over the methodology employed by the Commission in setting rates." Id. Likewise, in the present case, the ORS essentially argues that, by agreeing to a settlement with the utility, it can circumvent the South Carolina Commission's application of its own methodology and judgment in discharging its statutory duty "to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. §58-3-140(A) (Supp. 2007). Just as the Arkansas CURAD's argument failed in Bryant, ORS's argument in this case likewise fails.

Any distinctions between the Arkansas and South Carolina Commissions or between the ORS and the Arkansas CURAD do not change the principle for which the Commission cited Bryant. Both the Citizens Action case in Indiana and the Bryant case in Arkansas stand for the principle that the Commission is authorized to make the ultimate decision as to whether or not a stipulation or settlement in a utility rate case is to be approved and adopted. The parties can neither force the Commission to adopt a settlement nor veto a result with which they do not agree. While the ORS is charged by statute with the duty to *represent* the public interest as an advocate and make

recommendations to the Commission, it cannot unilaterally *determine* whether a proposed rate increase is in the public interest and *impose* a settlement. The Commission is statutorily empowered to make a decision, independent of the judgment of the ORS, as to whether a proposed settlement is just and reasonable, and therefore consistent with the public interest. Accordingly we affirm our prior ruling and reject the parties' arguments in the case before us.

CONCLUSION

Both the Petitions from United Utility Companies, Inc. and the Office of Regulatory Staff are denied. The Commission has reviewed each and every allegation of error contained in each petition seeking rehearing and reconsideration filed by the parties, and has concluded that the order complained of contains no error warranting a different result. To the extent that any party has alleged errors not specifically addressed here, they have been fully considered and rejected. We reiterate that if the parties had provided the requested evidence to support the proposed settlement of this rate case, it is possible and perhaps even probable, that the compromised rates would have been approved. Because the parties chose not to respond to the Commission's inquiries, the Commission had no choice but to reject the settlement and the Company's application based on the lack of evidence presented.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

C. Robert Moseley, Vice Chairman

(SEAL)